

(a) **Administration.** The [State Department of Revenue] shall perform all functions necessary and proper for the administration and enforcement of this Act, including promulgating regulations and reviewing protests in accordance with the [State Administrative Procedures Act].

(b) **Definitions.** For purposes of this Act:

- (1) “Check out services” means the provision by a marketplace to a seller of the means by which a sale or lease transaction may be consummated.
- (12) “Department” means the [State Department of Revenue].
- (23) “Director” means the Director of the [State Department of Revenue].
- (4) “Marketplace” means a place, digital or otherwise, on which or through which multiple sellers may advertise and/or sell products without the product or the seller necessarily being in the state.
- (5) “Marketplace facilitator” means a marketplace that provides check out services for a purchase.
- (6) “Marketplace seller” means a seller that sells or leases through a marketplace.
- (73) “Purchaser” means any person who purchases or leases a product for delivery to a location in this state.
- (8) “Referrer” means a person who:
(A) Contracts or otherwise agrees with a seller to list and/or advertise for sale products in any form, including, but not limited to, a catalog or Internet website;
(B) Receives a fee, commission, and/or other consideration from a seller for the listing for sale and/or advertisement of a product;
(C) Transfers, via in-state software, Internet link, or otherwise, an in-state customer to the seller or the seller’s employee, affiliate, or website; and
(D) Does not provide check-out services for the in-state customer for the transaction.
- (9) “Seller” means a person who sells or leases a product; the storage, use or consumption of which is subject to [State Use Tax Act] or the sale or lease of which is subject to [State Sales Tax Act]. For purposes of this chapter, the term “seller” does not include a seller who is required to collect sales or use tax in this state under the Commerce Clause of the United States Constitution or who chooses to voluntarily collect the tax notwithstanding that it is not required to do so.

(c) **Notice and Reports, Required.** A person who sells or leases a product; the storage, use, or consumption of which is subject to [State Use Tax Act], or the sale or lease of which is subject to [State Sales Tax Act]; but who does not collect and remit either such tax, shall provide the following notice and reports.

- (1) **Notice to Purchaser at Time of Transaction.** A notice shall be provided to each purchaser at the time of each such sale or lease.
- (A) The notice shall indicate that neither sales nor use tax is being collected or remitted upon the transaction, and that the purchaser may be required

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Comment [SHL1]: Pat proposes this definition, from the MA nexus regs.

Marketplace Facilitator. A person who, pursuant to an agreement with a vendor, facilitates sales by such vendor through a physical or electronic marketplace operated by the person, and engages:

(a) directly or indirectly, through one or more related persons in any of the following: 1. transmitting or otherwise communicating the offer or acceptance between a buyer and vendor; 2. owning or operating the infrastructure, electronic or physical, or technology that brings buyers and vendors together; 3. providing a virtual currency that buyers are allowed or required to use to purchase products from the vendor; or 4. software development or research and development activities related to any of the activities described in 830 CMR 64H.1.7(2); Marketplace Facilitator(b), if such activities are directly related to a physical or electronic marketplace operated by the person or a related person; and

(b) in any of the following activities with respect to the vendor’s products: 1. payment processing services; 2. fulfillment or storage services; 3. listing products for sale; 4. setting prices; 5. branding sales as those of the marketplace facilitator; 6. order taking; 7. advertising or promotion; or 8. providing customer service or accepting or assisting with returns or exchanges.

Comment [SHL2]: Do we want to include referrers at all? Referrers are different than marketplace sellers in a number of ways, perhaps the most important being that sales do not necessarily result from referrals. If we do include referrers, how broad should the term be? Should it include click-through affiliates? Pure advertisers (see next comment)?

Comment [SHL3]: While it would appear that DMA is solid authority that including advertising in a reporting statute would be constitutional under the due process clause, including advertising in the definition of a referrer could well be controversial. It is also likely to result in a referrer filing a large number of reports of advertising referrals that did not result in a sale. Such reports would be useless to the state. So, should advertising be included in the definition of a referrer?

to remit such tax directly to the Department.

- (B) The notice shall be prominently displayed on all invoices and order forms, including, where applicable, electronic and catalogue invoices and order forms, and upon each sale or lease receipt provided to the purchaser. No indication shall be made that sales or use tax is not imposed upon the transaction, unless: (i) such indication is followed immediately with the notice required by this section (c)(1); or (ii) the transaction with respect to which the indication is given is exempt from [State] sales and use tax pursuant to [State] law.

(C) Notwithstanding the provisions of this section, the marketplace facilitator shall provide the transaction notice in lieu of the marketplace seller, in all cases where the marketplace facilitator facilitated the sale.

- (2) **Annual Report to Purchaser.** A report shall be provided to each purchaser before January 31st of each year.

- (A) The report shall include:
 - (i) a statement indicating that the person did not collect sales or use tax on the purchaser's transactions and that the purchaser may be required to remit such tax directly to the Department;
 - (ii) a list, by date, generally indicating the type of product purchased or leased during the prior calendar year by the purchaser from such person for delivery to a location in this state and the price of each product;
 - (iii) instruction for obtaining additional information regarding whether and how to remit the sales or use tax to the Department;
 - (iv) a statement that such person is required to submit a report to the Department pursuant to section (c)(3) of this Act stating the total dollar amount of the purchaser's purchases; and
 - (v) any information as the Director shall reasonably require.
- (B) The report shall be sent to the purchaser's billing address, or if unknown, the purchaser's shipping address, in an envelope marked prominently with words indicating important tax information is enclosed. If no billing or shipping address is known, the report shall be sent electronically to the purchaser's last-known e-mail address with a subject heading indicating important tax information is enclosed.

(C) The seller may elect to provide the annual report to the purchaser electronically, provided that:

- (i) the election shall be made annually, and
- (ii) the electronic report shall be sent to the purchaser no later than December 1 of each year covered by the report.

Comment [SHL4]: How are December sales to be reported?

(D) Notwithstanding the provisions of this section, the marketplace facilitator shall provide the annual report in lieu of the marketplace seller, in all cases where the marketplace facilitator facilitated the sale.

(3) **Reports by Referrer.**]At such time during any calendar year, or any portion thereof, that a referrer receives more than then thousand dollars (\$10,000) from fees, commissions, and/or other compensation paid to it by sellers with whom it has a contract or agreement to list for sale and/or to advertise any product, said referrer shall within thirty (30) days provide written notice to all such sellers that the sellers' sales may be subject to this state's sales and use tax.

Comment [SHL5]: This provision is adapted from the RI statute.

Comment [SHL6]: To customers in this state? Is there a due process enforcement problem if the reporting obligation is not limited to in-state referrals? But if it is so limited, the referrals might not take place in the year in which the fees were paid.

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(43) Annual Report to [State Department of Revenue]. A report shall be provided before January 31st of each year to the Department.

- (A) The report shall include, with respect to each purchaser:
- (i) the name of the purchaser;
 - (ii) the billing address and, if different, the last known mailing address;
 - (iii) the shipping address for each product sold or leased to such purchaser for delivery to a location in this state; and
 - (iv) the total dollar amount of all such purchases by such purchaser which were made during the prior calendar year for delivery to each such address.

(B) The report shall be filed electronically in the form and manner required by the Director.

(C) The report shall be filed by the seller or marketplace seller in the case of sale through a marketplace, unless a marketplace facilitator facilitated the sale, in which case the marketplace facilitator shall file the report.

Comment [SHL7]: Should this be here or elsewhere in the draft as a stand-alone reporting provision for facilitators.

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(5) **Reporting Requirements As Applied to Controlled Groups.** Any member of a controlled group may file the reports required herein, provided that the annual report to the purchaser shall contain sufficient information to allow the consumer to determine the identity of the actual seller.

(d) Exceptions.

(1) **Small Seller.** A person who made less than \$A [original SST threshold for small seller was \$100,000] in total gross sales during the prior calendar year, or who acted as a marketplace facilitator for such sales, shall not be required to provide notice or file reports pursuant to section (c) of this Act.

Comment [SHL8]: Smaller threshold for facilitators? This draft has a \$10,000 threshold for referrers.

(2) **De minimis In-State Sales.** A person who made less than \$B [CO: \$100,000] in total gross sales for delivery to a location in this state during the prior calendar year, or who acted as a marketplace facilitator for such sales, shall not be required to provide notice or file reports pursuant to section (c) of this Act.

Comment [SHL9]: Smaller threshold for facilitators. This draft has a \$10,00 threshold for referrers.

(3) **Exceptions as Applied to Controlled Group.** Controlled groups filin a single report shall calculate these exceptions at the controlled group level.

~~(3)~~ **Sales by Registered Vendors.** A person who is registered to collect and remit sales and use tax, and who complies in good faith with the [State Sales and Use Tax Acts], shall not be required to provide notice or file reports pursuant to section (c) of this Act.

(e) **Penalties.**

(1) **Amount.** The Director shall assess a penalty upon any person who fails to provide notices and reports as required by this Act as follows:

(A) **Penalty for Failure to Provide Notice to Purchaser at Time of Transaction.** A person who fails to provide notice as required by section (c)(1) shall be assessed a penalty, in addition to any other applicable penalties, in the amount of \$X for each such failure, not to exceed:

- (i) a total of \$Y in one calendar year, if such person remedied each failure by providing such notices within X days of the date such notice was required to be provided, and
- (ii) a total of \$Z in one calendar year where section (e)(1)(A)(i) of this Act does not apply

(B) **Penalty for Failure to Provide Annual Report to Purchaser.** A person who fails to provide a report as required by section (c)(2) shall be assessed a penalty, in addition to any other applicable penalty, of \$X for each such failure, not to exceed:

- (i) a total of \$Y in one calendar year if such person remedied each failure by providing such notices within X days of the date such report was required to be provided, and
- (ii) a total of \$Z in one calendar year where section (e)(1)(B)(i) of this Act does not apply.

(C) **Penalty for Failure to Provide Annual Report to Department.** A person who fails to provide a report as required by section (c)(3) shall be assessed a penalty, in addition to any other applicable penalty, equal to \$X times the number of such purchasers that should have been included on such report, not to exceed:

- (i) a total of \$Y in one calendar year if such person remedied the failure by providing the report within X days of the date

- (ii) such report was required to be provided, and a total of \$Z in one calendar year where section (e)(1)(C)(i) of this Act does not apply.

- (2) **Estimates Authorized.** When assessing a penalty pursuant to section (e) of this Act, the Director may use any reasonable sampling or estimation technique where necessary or appropriate to determine the number of failures in any calendar year.
- (3) **Protest.** A person may protest the assessment of any such penalty or interest by filing a written objection with the Director within [number of days equal to the number of days allowed for protest of a use tax assessment or refund denial] days of the date of assessment. Disposition of a timely filed protest shall be in accordance with [State Administrative Procedures Act]. If no such protest is filed within the time allowed, the assessment shall become final and subject to [judgment, warrant, collection procedures].
- (4) **Interest.** Interest shall accrue on the amount of the total penalty that has been assessed and become final for each calendar year pursuant to section (e) of this Act at the rate established pursuant to [state code section setting interest rate for tax underpayment].
- (5) **Waiver.** Upon written request received within the time established for protest pursuant to section (e)(4) above, the Director, in his or her sole discretion, may waive any portion or all of the penalty or interest applicable under this section for good cause shown.

(f) **Confidentiality of Purchaser Information.** Information received by the [State Department of Revenue] pursuant to this Act shall be exempt from any disclosure required pursuant to [State Open Records Act]. Such information shall be treated as confidential taxpayer information pursuant to [cite to open records exception for confidential taxpayer information, including exceptions statutes] and all exceptions, penalties, punishments, and remedies applicable to disclosure of confidential taxpayer information pursuant to [cite to statutes regarding confidential taxpayer information disclosure exceptions and penalties] shall apply to disclosure of information received by the Department pursuant to this Act.

(g) **Sourcing Sales of Digital Goods.** For purposes of filing the reports required herein, the seller or marketplace facilitator may use any commercially reasonable method of sourcing the sales.

(h) **Lookback period.** The Department may require the seller or marketplace facilitator to file reports for prior years, not to exceed the number of open tax years pursuant to [the applicable general statute of limitations for consumer use tax reporting]. In all cases where the original seller or marketplace facilitator has been acquired by a successor in interest, the lookback period shall not exceed the number of years for which a successor

in interest is liable for the obligations of its predecessor in interest pursuant to [applicable state statute].

(ig) **Limitations.** Nothing in this Act shall relieve a person who is subject to [the state's sales tax act or the use tax act] from any responsibilities imposed thereunder. Nor shall anything in this Act prevent the Director from administering and enforcing [the state's sales tax act or the use tax act] with respect any person who is subject thereto.

(jh) **Severance.** The provisions of this Act are severable and if any section, sentence, clause or phrase of this Act shall for any reason be held to be invalid or unconstitutional, such holding shall not affect the validity of the remaining sections, sentences, clauses, and phrases of this Act, which shall remain in effect.